

**RULES
OF
TENNESSEE DEPARTMENT OF HUMAN SERVICES
ADMINISTRATIVE PROCEDURES DIVISION**

**CHAPTER 1240-5-6
RULES OF EVIDENCE AND DISCOVERY**

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1240-5-6-.01 RULES OF EVIDENCE.

- (1) Evidence in Hearings. In all Department hearings, the testimony of witnesses shall be taken in open hearings, except as otherwise provided by these rules. In the discretion of the Department or at the motion of any party, witnesses may be excluded prior to their testimony. The standard for admissibility of evidence, including admissibility of affidavits, is set forth at T.C.A. § 4-5-313.
- (2) The hearing official shall admit and give probative effect to evidence admissible in a court, and when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, evidence not admissible thereunder may be admitted if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. The hearing official shall give effect to the rules of privilege recognized by law and to state or federal statutes or regulations protecting the confidentiality of certain records and shall exclude evidence which in his/her judgment is irrelevant, immaterial or unduly repetitious.
- (3) Documentary evidence otherwise admissible may be received in the form of copies or excerpts, or by incorporation by reference to material already on file with the Department. Upon request, parties shall be given an opportunity to compare the copy with the original, if reasonably available.
- (4) Official notice may be taken of:
 - (a) Any fact that could be judicially noticed in the courts of this state;
 - (b) The record of other proceedings before the Department;
 - (c) Technical or scientific matters within the hearing official's specialized knowledge; and
 - (d) Codes or standards that have been adopted by an agency of the United States, of this state or of another state, or by a nationally recognized organization or association. Parties must be notified before or during the hearing, or before the issuance of any Initial or Final Order that is based in whole or in part on facts or material noticed, of the specific facts or material noticed and the source thereof, including any staff memoranda and data, and be afforded an opportunity to contest and rebut the facts or material so noticed.
- (5) Every party shall have the right to present evidence, to make arguments, and to confront and cross-examine witnesses.
- (6) At any time not less than ten (10) days prior to a hearing or a continued hearing, any party shall deliver to the opposing party a copy of any affidavit which such party proposes to introduce in evidence, together with a notice in the form provided in 1240-5-6-.01(8) below. Unless the opposing party within seven (7) days after delivery delivers to the proponent a request to cross-examine an affiant, the opposing party's right to cross-examination of such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-

(Rule 1240-5-6-.01, continued)

examine an affiant is not afforded after a proper request is made as herein provided, the affidavit shall not be admitted into evidence. Delivery for purposes of this paragraph shall mean actual receipt.

- (7) The hearing official assigned to conduct the hearing may admit affidavits not submitted in accordance with paragraph (6) above, where necessary to prevent injustice.
- (8) The notice referred to in 1240-5-6-.01(6) above shall contain the following information and be substantially in the following form:

The accompanying affidavit of _____ (here insert name of affiant) will be introduced as evidence at the hearing in _____ (here insert title of proceeding). _____ (Here insert name of affiant) will not be called to testify orally and you will not be entitled to question such affiant unless you notify _____ (here insert name of the proponent or the proponent's attorney) at _____ (here insert address) that you wish to cross-examine such affiant. To be effective, your request must be mailed or delivered to _____ (here insert name of proponent or the proponent's attorney) on or before _____ (here insert a date seven (7) days after the date of mailing or delivering the affidavit to the opposing party).

Authority: T.C.A. §§ 4-5-202, 4-5-313, 71-1-105(12) and 71-1-111. **Administrative History:** Original rule filed January 19, 1977; effective February 18, 1977. Amendment filed January 12, 1979; effective May 1, 1979. Amendment filed February 26, 2007; effective May 12, 2007.

1240-5-6-.02 EXAMINATION OF CASE FILE. Any party to a contested case shall have the right to examine Department manuals and the contents of the case file with respect to the matter being contested, and all documents and records used as evidence, at a reasonable time either before the date of the hearing or during the hearing. The case record and manuals shall not be removed from the local office. However, any party or his/her representative may copy entries or documents to be introduced at the hearing as supporting evidence.

Authority: TCA §4-5-311. **Administrative History:** Original rule filed January 19, 1977; effective February 18, 1977. Amendment filed December 17, 1982; effective March 16, 1983.

1240-5-6-.03 EX PARTE COMMUNICATION. Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in an appeal shall not communicate directly or indirectly in connection with any issue involved in such proceeding with any person except upon notice and opportunity for all parties to participate, except an agency member may communicate with other members of the agency, members of the Attorney General's staff or his personal assistants.

Authority: TCA §4-5-304. **Administrative History:** Original rule filed January 19, 1977; effective February 18, 1977. Amendment filed December 17, 1982; effective March 16, 1983.

1240-5-6-.04 DISCOVERY.

- (1) Any party to a contested case proceeding shall have the right to reasonable discovery pursuant to T.C.A. § 4-5-311.
- (2) Parties are encouraged to attempt to achieve any necessary discovery informally. When such attempts have failed, or where the complexity of the case is such that informal discovery is not practicable, discovery shall be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure (TRCP).
- (3) Upon motion of a party or upon the hearing official's own motion, the hearing official may order that discovery be completed by a certain date.

(Rule 1240-5-6-.04, continued)

- (4) Any motion to compel discovery, motion to quash, motion for protective order, or other discovery related motion shall:
 - (a) Quote verbatim the interrogatory, request, question, or subpoena at issue, or be accompanied by a copy of the interrogatory, request, subpoena, or excerpt of a deposition which shows the question and objection or response if applicable;
 - (b) State the reason or reasons supporting the motion; and
 - (c) Be accompanied by a statement certifying that the moving party or his or her counsel has made a good faith effort to resolve by agreement the issues raised and that agreement has not been achieved. Such effort shall be set forth with particularity in the statement.
- (5) The hearing official shall decide any motion relating to discovery pursuant to the Uniform Administrative Procedures Act (UAPA) and the rules promulgated thereunder or the TRCP.
- (6) Other than as provided in paragraph (4) above, discovery materials need not be filed with either the Department of State Administrative Procedures Division or the Appeals and Hearings Division.

Authority: T.C.A. §§ 4-5-202, 4-5-311, 71-1-105(12) and 71-1-111. **Administrative History:** Original rule filed January 12, 1979; effective May 1, 1979. Amendment filed December 17, 1982; effective March 16, 1983. Amendment filed February 26, 2007; effective May 12, 2007.